83-707

No. ...

IN THE

Supreme Court of the United States

October Term, 1983

FRANK L. TODD, *et al.*, each in his respective capacity as Trustee of the OPERATING ENGINEERS HEALTH AND WELFARE FUND, *et al.*, etc.,

Petitioners,

vs.

BENAL CONCRETE CONSTRUCTION COMPANY, INC., a California corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Questions Presented for Review.

1. Whether recovery of damages by employee fringe benefit trusts for the employer's conceded breach of an express obligation to make each owner-operator of construction equipment "a bona fide employee" is barred by § 302 of the Labor-Management Relations Act.

2. Whether employee fringe benefit trusts are entitled to recover damages for the employer's breach of a strict prohibition against performance of covered work by an "owner-employee," when the collective bargaining agreement expressly provides the measure of damages to the trusts.

3. Whether employee fringe benefit trusts adequately raised claims for damages caused by the employer's breaches of the subcontracting clause as required to preserve those claims for review on appeal.

List of Parties to Proceedings Below.

Pursuant to Rule 21.1(b) of this Court, the parties in the Court of Appeals are listed as follows:

Frank L. Todd, Ray E. Ehly, Freeman M. Roberts, William Schmidt, William C. Waggoner, John C. Maxwell, Dale I. Vawter, Jerald B. Laird, William Cobb, Jr., C. W. Poss, Verne W. Dahnke, Alexander Rados, William A. Floyd and Jerry Toll, each in his respective capacity as Trustee of the Operating Engineers Health & Welfare Fund; Frank L. Todd, Ray E. Ehly, Freeman M. Roberts, John C. Maxwell, William C. Waggoner, Dale I. Vawter, C. V. Holder, William A. Cobb, Jr., Alexander Rados, William A. Floyd, Edwin Kalish, Steve Billy, Winton Kemmis and Dean Sweeney, Jr., each in his respective capacity as Trustee of the Operating Engineers Pension Trust; Frank L. Todd, Ray E. Ehly, Freeman M. Roberts, Jerry Toll, William C. Waggoner, C. I. T. Johnson, Dale I. Vawter, Don McCoy, William A. Cobb, Jr., Alexander Rados, William A. Floyd and Dean Sweeney, Jr., each in his respective capacity as Trustee of the Operating Engineers Vacation-Holiday Savings Trust; Frank L. Todd, Ray E. Ehly, Freeman M. Roberts, William Schmidt, William C. Waggoner, Robert Lytle, Dale I. Vawter, Kenneth J. Bourguignon, Verne W. Dahnke, Winton Kemmis, William A. Floyd and Don MacIntosh, each in his respective capacity as Trustee of the Operating Engineers Training Trust,

Appellants below,

Benal Concrete Construction Company, Inc., a California corporation,

Appellee below.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF CASES AND AUTHORITIES

No. ..-....

IN THE

Supreme Court of the United States

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FRANK L. TODD, *et al.*, each in his respective capacity as Trustee of the OPERATING ENGINEERS HEALTH AND WELFARE FUND, *et al.*, etc.,

Petitioners,

vs.

BENAL CONCRETE CONSTRUCTION COMPANY, INC., a California corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners Frank L. Todd, et al., each in his respective capacity as Trustee of the Operating Engineers Health and Welfare Fund, Operating Engineers Pension Trust, Operating Engineers Vacation-Holiday Savings Trust, and Operating Engineers Training Trust, respectfully pray that a Writ of Certiorari issue to review the judgment of the U.S. Court of Appeals for the Ninth Circuit finally entered on September 15, 1983, in Case Nos. 82-5008 and 82-5064 of that Court.

OPINIONS BELOW.

The opinion of the Court of Appeals is officially reported at 710 F.2d 581 and appears at Appendix A (pp. 1-6) of this Petition. The order of the Court of Appeals denying the petition for rehearing and rejecting the suggestion for rehearing *en banc* appears at Appendix B (p. 7) of this Petition. The Findings of Fact and Conclusions of Law of the United States District Court for the Central District of California are not officially reported and appear at Appendix C (pp. 8-10) of this Petition. The Summary Judgment of the District Court appears at Appendix D (p. 11) of this Petition.

JURISDICTION.

The opinion of the Court of Appeals was filed and entered on July 14, 1983. A timely petition for rehearing and suggestion for rehearing *en banc* by the Petitioners were denied and rejected by order of the Court of Appeals filed on September 15, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED.

Section 302 of the Labor-Management Relations Act of 1947, as amended ("LMRA"), 29 U.S.C. § 186, 61 Stat. 157-58; 73 Stat. 537-39, provides in pertinent part as follows:

> "(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value —
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
>
> (2) to any labor organization, or any officer or employee thereof, which represents, seeks to rep-

resent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

* * *

(c) The provisions of this section shall not be applicable . . . (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, com-

pensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by an employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: Provided, That the requirements of clause (B) of the proviso to

clause (5) of this subsection shall apply to such trust funds;

* * *

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or imprisonment for not more than one year, or both."

* * *

Section 401(c)(3) of the Internal Revenue Code of 1954, as amended, 26 U.S.C. § 401(c)(3), 76 Stat. 812, provides as follows:

"(3) The term "owner-employee" means an employee who —

(A) owns the entire interest in an unincorporated trade or business, or

(B) in the case of a partnership, is a partner who owns more than 10 percent of either the capital interest or the profits interest in such partnership.

To the extent provided in regulations prescribed by the Secretary, such term also means an individual who has been an owner-employee within the meaning of the preceding sentence."

STATEMENT OF THE CASE.

Respondent Benal Concrete Construction Company, Inc. ("Benal") is an employer in the construction industry, engaged primarily in providing trenching for foundations and pouring concrete slabs for houses and subdivisions in San Diego County, California. Benal's collective bargaining agreement with the International Union of Operating Engineers, Local Union No. 12 ("Local 12") binds Benal to the Master Labor Agreement negotiated and amended by Local 12 and certain construction employer associations in

San Diego County in 1969, 1972 and 1977. The Master Labor Agreement ("MLA") covers employees who operate, maintain or repair heavy construction equipment, and requires each signatory employer to pay contributions on behalf of covered employees for health care, pension, vacation-holiday and training benefits to trusts administered by Petitioners ("Trustees") pursuant to § 302(c)(5) and (6) of the LMRA [29 U.S.C. § 186(c)(5), (6)].

MLA Owner-Operator Clause.

In establishing the wages and working conditions of covered employees, the MLA restricts the manner in which the signatory employer may use the services of an "owner-operator," defined as a person who owns and operates equipment in the performance of work of the nature covered by the MLA. The MLA expressly obligates the employer to treat each owner-operator as a "bona fide employee." The MLA requires that the owner-operator be placed on the employer's payroll and paid the established wage rates separate from payments for equipment, requires that the owner-operator be properly cleared by Local 12's hiring hall, and expresses the intentions of the owner-operator clause as being "to assure the payment of wages, subsistence and fringe benefit payments and the observance of the conditions provided in this Agreement, and to prohibit the making and carrying out of any plan, scheme or device to circumvent or defeat . . ." these objectives. The record contains a sworn declaration of one of Local 12's negotiators as extrinsic evidence of these purposes of the owner-operator clause.

MLA Owner-Employee Clause.

The 1972-77 MLA expressly prohibits performance of covered work by any "owner-employee" as defined by § 401(c)(3) of the Internal Revenue Code [26 U.S.C. § 401(c)(3)], and requires the employer to pay compensa-

tory damages to the Trustees in amounts which would otherwise have been due if an employee had performed such work.

MLA Subcontracting Clause.

The MLA further provides that, if the subcontractor of a signatory employer fails to pay contributions to the Trustees as required by the MLA, the signatory employer is liable to the Trustees for the unpaid amounts "without regard to whether any specific employee enjoys the benefit of such contributions . . ." An owner-operator with additional pieces of equipment which are operated by other employees of the owner-operator is required to be treated as a subcontractor to the extent of such other equipment and employees.

Benal's Conduct.

Since 1970, Benal has used three owner-operators to perform covered work, treating each as an independent contractor rather than as a "bona fide employee." Benal paid no contributions to the Trustees on behalf of the owner-operators. In addition, each of the three owner-operators, as well as a fourth subcontractor (a partnership), had other employees performing covered work for whom no contributions were paid to the Trustees.

The Proceedings Below.

The Trustees sought access to Benal's business records for audit in 1978 and, after records pertaining to payments for owner-operators and subcontractors were refused, filed this action pursuant to § 301(a) of the LMRA [29 U.S.C. § 185(a)] in the Central District of California on July 19, 1979. Through discovery, the Trustees learned of Benal's business practices and claimed damages of $60,914.40, plus audit costs of $500.00 and attorney's fees, for Benal's breaches of the owner-operator and subcontracting provisions of the MLA.

The District Court granted summary judgment in favor of Benal on grounds that each of the owner-operators and the partnership performed work for Benal as independent contractors, and fringe benefit payments by Benal to the Trustees "on behalf of" such persons are barred by § 302 of the LMRA. The Trustees recovered nothing under the summary judgment entered in the District Court.

On appeal, the Ninth Circuit acknowledged the requirement of the MLA that an owner-operator "shall become a bona fide employee of the contractor" and that Benal "indisputedly breached the terms of the MLA owner-operator clause." *Pet. App.*, pp. 2-3. However, the Court of Appeals affirmed the summary judgment below, reasoning that the record lacks proof of intent of the MLA "to change the substantive nature of Benal's relationship to the owner-operators . . .," including the degree of control, supervision and the manner of accomplishing the work. *Pet. App.*, p. 6. In the absence of such proof, the Court of Appeals concluded that Benal could not be required to make contributions to the Trustees "on behalf of" the owner-operators who performed covered work and affirmed the summary judgment on that ground. As in the District Court, the Court of Appeals makes no reference to the Trustees' claims for damages for breach of the subcontracting clause through use of other employees by the owner-operators. The Court of Appeals makes only a footnote reference to a possible breach in using the partnership subcontractor, and declines to review that claim on grounds that the Trustees "did not present this argument to the district court." *Pet. App.*, p. 4.

REASONS FOR GRANTING THE WRIT.

I.

The Owner-Operator Clause Is Entitled to a Lawful and Enforceable Interpretation, and the Trustees Should Be Awarded Damages for Its Breach by Benal.

1. This case involves an important and closely related variation of the collective bargaining dispute resolved by the Court in *Walsh v. Schlecht*, 429 U.S. 401, 97 S.Ct. 679 (1977). In *Walsh*, the collective bargaining agreement required the signatory employer to pay certain amounts to § 302 trusts if the employer subcontracted covered work to a non-signatory subcontractor. This case involves a similar agreement restricting the employer's right to subcontract covered work to an individual worker, *i.e.*, an "owner-operator," by requiring the employer to make the owner-operator "a bona fide employee" and, thus, to make contributions to § 302 trusts with respect to such employee.

In *Walsh*, the restriction on subcontracting was given a lawful and enforceable meaning, with the necessary result that employees of the non-signatory subcontractor were ineligible to receive benefits from the § 302 trusts. The clause in this case distinguishes the circumstance in which the "subcontractor" is an individual worker, requires that individual to be made "a bona fide employee," and thereby enables the individual to benefit from related contributions to the trusts.

Such an "owner-operator" clause designed to enable individual workers to benefit from § 302 trusts, if indeed the employer makes the worker a bona fide employee, is entitled under *Walsh* to a lawful and enforceable interpretation. Such clauses benefiting individual workers deserve encouragement; instead, the Court of Appeals has thwarted the award of damages for breach of the "owner-operator" clause,

leaving unions no clear alternative except clauses requiring payment of damages to the trusts if work is subcontracted to such individual owner-operators.

2. The owner-operator clause first became part of the MLA in 1969, when the construction industry of Southern California experienced the longest general strike in its history, with owner-operators as the central issue. Local 12 and other unions similarly situated faced a dilemma created partly by equipment dealers ready to supply practically every workman a "low-or-no-equity" piece of equipment to own and operate, and partly by construction employers seeking to undercut Local 12's wages and working conditions through hard bargaining for "operated equipment rates" with individual owner-operators. The owner-operator constituted an encroachment on unit work as serious as any subcontracting of the work of Local 12's members. The owner-operator clause preserved unit work and protected the union standards of the MLA for almost fifteen years, until the Court of Appeals declined to award damages for its breach in this case.

By declining to provide a remedy for the "indisputedly breached" owner-operator clause, the Court of Appeals has seriously undercut the bargaining parties' consensual resolution of a major concern of organized labor. The unsettling effect of the decision will be felt not only in Local 12's master labor agreements covering thousands of employers in Southern California and Southern Nevada, but also in many other collective bargaining agreements across the country containing largely identical owner-operator clauses covering primarily operating engineers and teamsters.[1]

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[1] *Teamsters v. Oliver*, 358 U.S. 283, 79 S.Ct. 297 (1959), held that State antitrust law could not bar a substantially identical teamster owner-operator clause which this Court viewed as intended "to protect lawful employee interests against what is believed, rightly or wrongly, to be 'a scheme or device . . . for . . . escaping . . . union wages and . . . working conditions . . .' " *Id.*, 358 U.S. at 294, 79 S.Ct. at 303. The Court concluded that any "limitation on the arrangements that unions

3. The harm of the Court of Appeals' decision results primarily from an erroneous application of the ruling in *Walsh v. Schlecht, supra*, where this Court held:

> "[A]mbiguously worded contracts should not be interpreted to render them illegal and unenforceable where the wording lends itself to a logically acceptable construction that renders them legal and enforceable." *Id.*, 429 U.S. at 408, 97 S.Ct. at 685.

This rule was applied in *Walsh* as a basis for interpreting a subcontracting clause to mean that contributions to § 302 trusts were to be "measured by" the hours of employment of a non-signatory subcontractor's employees, rather than made "on behalf of" or "for the benefit of" those employees. This Court found enforcement of the contract clause according to that interpretation to be consistent with the wording of § 302 and "no disservice to the congressional purpose" in enacting § 302 to fight "corruption of collective bargaining through bribery . . . extortion . . . and . . . [other] possible abuse . . ." *Id.*, 429 U.S. at 410-11, 97 S.Ct. at 686.

The Court of Appeals' decision devastates the rationale of *Walsh* in two ways: first, *Walsh* is read as holding merely that § 302 thrusts can accept contributions only "on behalf of" employees (*Pet. App.*, p. 3); and, second, the MLA is then read as requiring contributions to the Trustees "on behalf of" owner-operators as independent contractors, rather than as employees. The Court of Appeals reached this highly strained, illegal and unenforceable interpretation of the owner-operator clause despite its own earlier acknowledgements that (a) the MLA obligates Benal to make each owner-

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and employers may make with regard to these subjects . . . is for Congress, not the States . . .," 358 U.S. at 297, 79 S.Ct. at 305, without the slightest indication that § 302 of the LMRA itself would bar enforcement of such clauses.

operator a "bona fide employee" (*Pet. App.*, p. 2); (b) Benal "indisputedly breached" that obligation (*Pet. App.*, p. 2); and (c) the Trustees sought to recover only damages for the breach, not contributions "on behalf of" the owner-operators. *Pet. App.*, p. 3. Only by presuming that the parties to the MLA intended for the employer to *fake* making the owner-operator a "bona fide employee" — despite clear, express, detailed language in the MLA and extrinsic evidence to the contrary — could the Court of Appeals reach the illegal and unenforceable meaning attributed to the owner-operator clause. This is precisely contrary to the true teaching of *Walsh*.

4. The Court of Appeals' decision conflicts with the holding of the Tenth Circuit in *Trustees of Teamsters, Etc. v. Hawg-N-Action, Inc.*, 651 F.2d 1384 (10th Cir. 1981), *cert. denied*, 455 U.S. 941, 102 S.Ct. 1433-34 (1982), which awarded damages for breach of an owner-operator clause covering teamsters, despite a defense that the owner-operator drivers were actually independent contractors. *Id.*, 651 F.2d at 1388.

By contrast, *Joint Council of Teamsters No. 42 v. Associated General Contractors*, 520 F.Supp. 3 (C.D. Cal. 1980), *aff'd per curiam*, 662 F.2d 531 (9th Cir. 1981), *cert. denied*, 455 U.S. 1021, 102 S.Ct. 1718 (1982), on which the decision in this case relies (*Pet. App.*, p. 5), was a suit for a declaratory judgment as to whether teamster owner-operators with stipulated duties and working conditions were employees qualified for benefits from § 302 trusts.

5. In improperly relying upon § 302 as a statutory basis for denying the Trustees a remedy for the conceded breach of contract, the Court of Appeals not only misapplied *Walsh v. Schlecht, supra*, but also failed to follow a fundamental principle in review of summary judgment:

> "[O]n summary judgment the inferences to be drawn from the underlying facts contained in [the moving party's] materials must be viewed in the light most favorable to the party opposing the motion." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-59, 90 S.Ct. 1598, 1609 (1970).

Despite the clear language of the owner-operator clause and extrinsic evidence of its purpose, the Court of Appeals affirmed summary judgment against the Trustees based on a factual inference that the parties to the MLA never intended the owner-operator to be made "a bona fide employee."

II.

The Trustees Are Entitled to an Award of Damages as Specified in the Master Labor Agreement for the Employer's Breach of the Strict Prohibition Against Performance of Covered Work by "Owner-Employees."

The rationale of the Court of Appeals is absolutely inadequate as a basis for denying a remedy under the 1972-1977 MLA clause strictly prohibiting performance of covered work by any "owner-employee" as defined in IRC § 401(c)(3) [26 U.S.C. § 401(c)(3)].[2] Each of the three owner-operators used by Benal, and each of the two equal partners of the partnership subcontractor, were "owner-employees" under that statute because each owned either "the entire interest in an unincorporated trade or business" or "'more than 10 percent" of the interest in a partnership. The applicable MLA clause expressly requires the award of

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[2]Since the Court of Appeals' decision is tantamount to a holding that Local 12 cannot effectively require an employer to make an owner-operator a "bona fide employee" and pay contributions to the Trusts on behalf of that employee, Local 12's only remaining alternative would appear to be a strict prohibition against any work by an "owner-employee," with damages to be awarded for a violation.

damages to the Trustees for such a violation and, being in effect for five of the ten years audited, enforcement of this clause alone would remedy almost one-half of the Trustees' claims.

III.

The Trustees Fairly Raised Claims Under the Subcontracting Clause for Damages Arising From Benal's Use of Subcontractors Who Failed to Pay Contributions on Their Employees, and Appellate Review Should Remedy Those Properly Preserved Claims.

The decision of the Court of Appeals makes no comment on the Trustees' claims for damages equal to the amount of contributions unpaid on persons employed by the three owner-operators to perform work covered by the MLA. In footnote 3 (*Pet. App.*, p. 4) the Court of Appeals refers to the claimed breach of the subcontracting clause in Benal's use of a partnership subcontractor, but declines to review the merits on grounds that this argument had not been presented to the District Court, citing *Singleton v. Wulff*, 428 U.S. 106, 121, 96 S.Ct. 2868 (1976).[3]

To be foreclosed from review on appeal, the Trustees' claims for breach of the subcontracting clause must have been "neither argued nor decided" in the court below. *Regents v. Bakke*, 438 U.S. 265, 283, 98 S.Ct. 2733, 2744

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[3] *Singleton v. Wulff, supra*, is inapposite to the issue of whether a claim has been adequately presented in the district court to preserve standing for appeal. In *Singleton*, this Court required a court of appeals to remand the case to the district court, rather than reach the merits of the claims, because the appeal had been from the granting of a motion to dismiss which had preceded litigation of the merits of the parties' claims and defenses. *Id.*, 428 U.S. at 119-20, 96 S.Ct. at 2876-77. In this case, the claims were actually litigated, but the District Court failed to make any express disposition of the related issues in its summary judgment.

(1978). The Trustees' claims for breach of the subcontracting clauses by Benal were continuously pursued both in the District Court and in the Court of Appeals, since they comprise more than one-half of all claims.

An entire section of written argument in the Trustees' memorandum filed in the District Court in support of summary judgment for the Trustees was entitled: "*Benal is also Obligated to Pay Contributions Based on Hours Worked by the Employees of Owner-Operators.*" In that written argument, the Trustees' memorandum quotes the applicable provision of the MLA as follows:

> "It is further agreed that at any time an individual Owner-Operator has more than one piece of equipment on any job or project, that the provision of this Paragraph P [owner-operator clause] will not apply to the additional equipment, rather, Article I, Paragraph B-6 [subcontracting clause], shall become applicable."

The Trustees' memorandum filed in the District Court then quotes Paragraph B-6, the subcontracting clause of the MLA, which expressly makes Benal liable to the Trusts for contributions or damages if Benal's subcontractor fails to pay contributions to the Trusts, "without regard to whether any specific employee enjoys the benefit of such contributions. . . ."

At oral argument in the District Court on the Trustees' motion for summary judgment, counsel for the Trustees argued at length to the same effect: that "some of these owner-operators had employees" that "those employees are covered under the subcontracting provisions of the Master Labor Agreement", that the subcontracting clause made Benal liable and that "the *damages* for that breach must be *measured by* the hours which *these employees of owner-operators or owner-operators themselves worked.*" (Emphasis added.)

The stipulation of facts which forms part of the record for summary judgment proceedings contains literally pages of subcontracting clauses excerpted from the MLA for consideration and application by the District Court. The facts that each owner-operator employed other employees and that the partnership employed the two partners to do work covered by the MLA are clearly set forth in the stipulated facts. In addition, in filing their motion for summary judgment in the district court, the Trustees lodged proposed findings of fact in which proposed findings 9, 10, 11, 13, 14, 15 and 16 covered the subcontracting violations arising in relation to *employees* of the individual owner-operators and of Arellanez Trenching (the partnership) in explicit detail. When the district court tentatively granted summary judgment for Benal, counsel for the Trustees then filed a request for additional findings of fact in which requested findings 2, 4, 5, 6, 7, 8 and 9 again covered the subcontracting violations arising from non-payment of contributions on employees of Benal's subcontractors.

In the Court of Appeals, the Trustees' opening brief thoroughly presented the facts and argument supporting the subcontracting clause violations. Benal's reply brief simply acknowledged tnat no contributions had been paid to the Trusts based on work performed by "owner-operators and subcontractors", and then substantially conceded the issue of subcontracting violations by arguing only that owner-operators were not employees on whose behalf contributions could be made.

With the record in this state, and no suggestion by Benal in the Court of Appeals that the subcontracting clause violations were not presented in the District Court, the Trustees seem clearly entitled to have those breaches of contract addressed and remedied. The established general rule that an issue "not raised or resolved" below will not be con-

sidered on appeal, *Youakim v. Miller*, 425 U.S. 231, 234, 96 S.Ct. 1399, 1401 (1976), appears to be fully satisfied by the record in this case. However, if a civil litigant in federal courts may be deprived of review on appeal after having pursued the claim to the extended degree shown here, then a more precise and definitive legal standard is needed from this Court for use by the courts of appeals in determining whether a claim or issue has been "raised . . . below" sufficiently to qualify for review on appeal.

CONCLUSION.

Based on the foregoing, the petition for writ of certiorari should be granted.

Dated: October 25, 1983.

Respectfully submitted,

WAYNE JETT,*
JETT, CLIFFORD & LAQUER,
Counsel for Petitioners.
**Counsel of Record.*

APPENDIX A.

Opinion.

In the United States Court of Appeals for the Ninth Circuit.

Frank L. Todd, et al., etc., Plaintiffs-Appellants/Cross-Appellees, v. Benal Concrete Construction Co., Inc., Defendant-Appellee/Cross-Appellant. Nos. 82-5008/5064; DC # CV-79-2740-CBM.

Filed: July 14, 1983.

Appeal from the United States District Court for the Central District of California.

Consuelo B. Marshall, District Judge, Presiding. Argued and submitted June 6, 1983.

Before: SKOPIL, SCHROEDER, and FARRIS, Circuit Judges. SCHROEDER, Circuit Judge.

This is an action by trustees of four employee fringe benefit trust funds to recover contributions from Benal Concrete Construction Company for work performed by trenchers on Benal jobs. The district court granted summary judgment for Benal, holding that the trenchers were independent contractors and that section 302 of the Labor Management Relations Act (LMRA) prohibits payments to trust funds on behalf of such individuals.[1] We affirm. We also affirm the district court's denial of costs and attorney's fees to Benal which Benal challenges on cross-appeal.

The facts are all as stipulated in the district court proceeding. Benal is a party to a collective bargaining agreement with the International Union of Operating Engineers

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[1]Section 302(a)(1) of the LMRA prohibits payments by employers to "any representative of any of his employees. . . ." 29 U.S.C. § 186(a)(1). Sections 302(c)(5) and (6), however, make exceptions for certain employer payments to trust funds created by representatives "for the sole and exclusive benefit of the *employees of such employer*. . . ." 29 U.S.C. § 186(c)(5), (6) (emphasis supplied).

Local No. 12. That agreement incorporates by reference the terms of the industry-wide San Diego Master Labor Agreement (MLA). The MLA requires signatory employers to use workers referred by Local 12 and to make fringe benefit contributions to the trusts for all covered work they perform. However, the agreement also contemplates that employers may need to hire independent subcontractors and owner-operators to perform covered work, and it includes specific provisions which pertain to such situations.

The dispute between the parties in this case centers around a clause in the MLA relating to "owner-operators," who are described as persons who own and operate their own equipment.[2] They are not referred by the union hall. The parties agree that Benal engages such owner-operators to perform trenching work, but exercises little, if any, control over the details of that work; the owner-operators are not supervised or directed by Benal. Benal merely gives the owner-operators construction plans and pays them based on the number of feet trenched.

The MLA clause regarding owner-operators provides that after reporting to the jobsite, an owner-operator "shall become a bona fide employee of the Contractor." The Contractor thereby would be required under the MLA to make contributions to the trusts on behalf of the owner-operator based on the hours of work he performed. Here, it is uncontroverted that Benal did not put the independent operators on its payroll or make the required contributions to the trusts. Benal therefore indisputedly breached the terms of the MLA owner-operator clause.

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[2]The MLA provides: "An owner-operator is a person who has legal or equitable title to his equipment and operates the equipment himself on work covered by this Agreement."

The trusts' position is that Benal is responsible for damages occasioned by its breach — the amount of payments which would have been paid to the trusts for the hours worked by the owner-operators. Benal's response is that its basic relationship to the trenchers is that of contractor/independent contractor and that since contributions "on behalf of" independent contractors are illegal under section 302, it cannot be required to make such payments to the trusts. The district court agreed with Benal.

We review the district court's judgment to determine whether, given the stipulated facts, Benal was entitled to prevail as a matter of law. *Sapper v. Lenco Blade, Inc.*, 704 F.2d 1069, 1071 (9th Cir. 1983). Federal law governs parties' rights in actions such as this under § 301 of the LMRA. *Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448, 77 S. Ct. 912 (1957).

In *Walsh v. Schlecht*, 429 U.S. 401, 97 S. Ct. 679 (1977), the Supreme Court analyzed the requirement that trust contributions under section 302(c)(5) must be "for the sole and exclusive benefit of *employees*." 29 U.S.C. § 186(c)(5) (emphasis supplied). The Court concluded that this phrase only permits contributions "on behalf of" or "for the benefit of" a contractor's *own* employees. Nevertheless the Court recognized the importance of subcontractor clauses designed to prevent subcontracting of covered work to nonsignatory contractors in the construction industry. It therefore held that contributions may reflect work performed by employees of such independent subcontractors, but only if the amounts are "measured by" the number of hours worked. Utilizing this test, we recently approved a clause which required a contractor to make contributions measured by the hours worked by his subcontractors and their employees. *Brogan v. Swanson*, 682 F.2d 807, 809 (9th Cir. 1982). *See also Burke v. French Equipment Rental, Inc.*, 687 F.2d

307, 311-12 (9th Cir. 1982) (contractor's obligation to pay into trust can be measured by hours worked by subcontractors).

The owner-operator clause in this case, however, is not like the subcontractor clause at issue in *Brogan*.[3] This clause does not require payments "measured by" hours worked by employees of other employers. It requires Benal to make the independent operator an "employee," so that payments are made on his behalf within the meaning of § 302 as discussed in *Walsh v. Schlecht*. We had occasion to interpret a markedly similar master labor agreement provision in *Waggoner v. Northwest Excavating, Inc.*, 642 F.2d 333 (9th Cir. 1981), *vacated and remanded on other grounds* 455 U.S. 931, 10 S. Ct. 1417 (1982), *reaff'd*, 685 F.2d 1224 (9th Cir. 1982), *cert. denied*, ___ U.S. ___, 103 S. Ct. 737 (1983) (*Waggoner*). We observed that section 302 prohibits trust payments on behalf of owner-operators who are, in reality, independent contractors under the common law agency test.[4] 642 F.2d at 336-37. We did not, however, consider what effect, if any, compliance with the contract provision requiring an employer to treat an independent contractor as an employee would have, because we affirmed the district court's finding that the defendant in that case,

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[3]We note that the MLA at issue does contain such a subcontractor provision in a separate section, and that one entity at issue in this case, a partnership, may, under one interpretation of the MLA, be considered a subcontractor rather than an owner-operator. If this interpretation were to be accepted, a different result might be required with respect to this entity. We forego any such analysis, however, because appellants did not present this argument to the district court. *See Singleton v. Wulff*, 428 U.S. 106, 121, 96 S. Ct. 2868 (1976).

[4]The common-law agency test is the accepted means of distinguishing employees from independent contractors. *NLRB v. United Insurance Co.*, 390 U.S. 254, 256, 88 S. Ct. 988, 989 (1968). In applying this test, this court considers the factors set forth in the *Restatement (Second) of Agency* § 220(2). *See Teamsters Local 162 v. Mitchell Bros.*, 682 F.2d 763, 766 (9th Cir. 1982); *Waggoner*, *supra*, 642 F.2d at 336.

Northwest, was a broker, not a contractor, and that the provision of the MLA therefore did not apply to it. 642 F.2d at 337. The question is now directly before us; neither party disputes the fact that Benal is a contractor obligated under the MLA to treat an owner-operator as a "bona fide employee."

We decided a similar issue in *Joint Council of Teamsters Local 42 v. Associated General Contractors*, 520 F.Supp. 3 (C.D. Cal. 1980), *aff'd per curiam*, 662 F.2d 531 (9th Cir. 1981) (*Associated General Contractors*). The district court, in an opinion which this court approved, analyzed a provision in a master labor agreement which included "owner-operators" in the definition of "employees." That provision was designed to achieve the same result as the contractual provision at issue in this case — to require employers to make trust fund contributions on behalf of work performed by independent owner-operators. We there held that the existence of such a clause did not, in and of itself, transform the employer/independent contractor relationship into one of employer/employee for purposes of section 302 and compliance with the principle established in *Walsh v. Schlecht*. Thus, contributions to the trust fund "on behalf of" owner-operators could not be required under the contract in *Associated General Contractors* because the owner-operators were not, in fact, employees.

On the record before us, we must reach the same conclusion in this case. Contractual language alone cannot transform a contractor/independent contractor relationship into an employer/employee relationship. *Associated General Contractors, supra*, 520 F.Supp. at 4. For such contributions on behalf of workers to be permitted under *Walsh v. Schlecht*, a true employment relationship must be demonstrated. Here, however, there is no showing that the substantive nature of Benal's relationship to the owner-opera-

tors would, if the contract were followed, become one of employer/employee under the test employed by this court. *See Waggoner, supra*, 642 F.2d at 336-37 (application of common law agency test to owner-operators performing in similar capacity). There is nothing in the facts stipulated in this record to suggest that if Benal had complied with the contract's formal requirements, the manner in which the work was accomplished, including the lack of control and supervision by Benal, would have changed. Nor is there anything to suggest that the parties intended the contract to change the substantive nature of Benal's relationship to the owner-operators.

We therefore hold that in light of *Walsh v. Schlecht*, the district court correctly concluded as a matter of law that Benal could not be required to make trust contributions "on behalf of" the owner-operators who performed trenching work.

Benal has cross-appealed for costs and attorney's fees. There is no showing of bad faith in this record that would justify such an award and the district court therefore did not abuse its discretion in refusing Benal's request. *Sapper v. Lenco Blade, Inc., supra*, 704 F.2d at 1073. Similarly, this is not a frivolous appeal which may warrant, in our discretion, an award of costs and attorney's fees. *See International Union of Petroleum and Industrial Workers v. Western Industrial Maintenance*, No. 82-5960, slip op. at 2540, 2545 (9th Cir. June 1, 1983), *citing McConnell v. Critchlow*, 661 F.2d 116, 118 (9th Cir. 1981).

Affirmed.

APPENDIX B.
Order.
(Central District of California).

In the United States Court of Appeals for the Ninth Circuit.

Frank L. Todd, et al., etc., Plaintiffs-Appellants/Cross-Appellees, v. Benal Concrete Construction Co., Inc., Defendant-Appellee/Cross-Appellant. Nos. 82-5008/5064.

Filed: September 15, 1983.

Before: SKOPIL, SCHROEDER, and FARRIS, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C.
Findings of Fact and Conclusions of Law.

United States District Court, Central District of California.

Frank L. Todd, et al., etc., Plaintiffs, vs. Benal Concrete Construction Co., Inc., etc., Defendant. Case No. CV 79-02740 CBM.

Date: 10-5-81
Time: 10:00 a.m.
Dept: 11
Filed: November 18, 1981.

The above-entitled cause came on regularly for hearing on plaintiffs' and defendant's cross-motions for summary judgment on October 5, 1981, before the Court, the Honorable Consuelo B. Marshall, United States District Judge, presiding; plaintiffs were represented by Robert Scot Clifford of Jett, Clifford & Laquer, and defendant was represented by Norman R. Allenby of Hillyer & Irwin. There being no material issue of fact to be litigated at trial, the Court renders its decision in writing and makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The plaintiffs are the trustees of the Operating Engineers Health and Welfare Fund, Operating Engineers Pension Trust, Operating Engineers Vacation-Holiday Savings Trust, and Operating Engineers Training Trust (hereinafter "Trusts"). The Trusts are express trusts established by written agreements between the International Union of Operating Engineers, Local Union No. 12 (hereinafter "Local 12"), and various multiemployer associations in Southern California and Southern Nevada. The Trusts were organized and now exist pursuant to Section 302 of the Labor Management Relations Act of 1947 [29 U.S.C. § 186].

2. At all times relevant hereto, defendant BENAL CONCRETE CONSTRUCTION CO., INC. (hereinafter "BENAL") has been a corporation organized and existing under the laws of the State of California.

3. Local 12 is a labor organization representing employees in an industry affecting interstate commerce.

4. At all times relevant hereto, BENAL has been bound to collective bargaining agreements (hereafter "Agreements") with Local 12 which incorporated, with certain express exceptions not relevant here, the terms and provisions of the San Diego County Master Labor Agreement (hereinafter "MLA") between Local 12 and the San Diego County General Contractors Associations.

5. At all times relevant herein, BENAL has been bound to the Trust Agreements establishing the four plaintiff Trusts.

6. Arellanez Trenching ("Arellanez"), Dean Burgess Trenching ("Burgess"), H. J. Livermore ("Livermore") and Herlie Ashcraft Trenching Contractor ("Ashcraft") are each either a partnership or sole proprietorship which performed work for BENAL at various times between January 1, 1970 and March 31, 1980. Each of these entities was an independent contractor and not an employee of BENAL when the work in question was performed.

CONCLUSIONS OF LAW.

1. This court has jurisdiction over this action under Section 301(a) of the Labor Managment Relations Act, as amended [29 U.S.C. § 185(a)] and under Section 502(a)(3) of the Employee Retirement Income Security Act, as amended [29 U.S.C. § 1132(a)(3)].

2. The payment claimed in this action by plaintiffs and alleged to be due for fringe benefit payments on behalf of the persons performing work on behalf of defendant are barred by Section 302 of the Labor Management Relations

Act and therefore no sums are due plaintiff.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: 11/17/81

/s/ Consuelo B. Marshall
UNITED STATES DISTRICT JUDGE

APPENDIX D.
Summary Judgment.

United States District Court, Central District of California.

Frank L. Todd, et al., etc., Plaintiffs, vs. Benal Concrete Construction Co., Inc., etc., Defendant. Case No. CV 79-02740 CBM.

Filed: November 18, 1981.

The above-entitled cause came on regularly for hearing on defendant's motion for summary judgment on October 5, 1981, before the Court, the Honorable Consuelo B. Marshall, United States District Judge presiding. Norman R. Allenby of Hillyer & Irwin appeared as counsel for defendant, BENAL CONCRETE CONSTRUCTION CO., INC. Robert Scot Clifford of Jett, Clifford & Laquer, appeared as counsel for plaintiffs FRANK L. TODD, et al., Trustees of the Operating Engineers Health and Welfare Fund, etc. There being no material issues of fact to be litigated at trial, and findings of fact and conclusions of law having been filed herein,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED;

Defendant, BENAL CONCRETE CONSTRUCTION CO., INC., shall have judgment against plaintiffs and all proceedings against said defendant are dismissed.

Dated:

/s/ Consuelo B. Marshall
UNITED STATES DISTRICT JUDGE

No. 83-707

In The

Supreme Court of the United States

October Term, 1983

FRANK L. TODD, et al., each in his respective capacity as Trustee of the OPERATING ENGINEERS HEALTH AND WELFARE FUND, et al., etc.,

Petitioners,

vs.

BENAL CONCRETE CONSTRUCTION COMPANY, INC., a California corporation,

Respondent.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rule

Statutes

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Statement of the Facts

Respondent BENAL CONCRETE CONSTRUCTION COMPANY, INC. ("BENAL")[1] is a contractor engaged

1 This is BENAL'S original Designation of Corporate Relationships. BENAL is not owned by any parent corporation. BENAL does not have an ownership interest in any subsidiaries, nor does BENAL have any affiliates.

in the business of trenching foundations and pouring concrete slabs for houses and subdivisions in San Diego County, California. BENAL is signatory to a Master Labor Agreement ("MLA") with the International Union of Operating Engineers, Local Union No. 12 ("UNION"). Since BENAL does not own trenching machinery nor have employees qualified to perform the trenching work, it contracts out the trenching portion of its work to independent contractors called trenchers. BENAL contracts with one of the four trenchers in San Diego County each of whom are capable of performing the work. Of the four trenchers involved, one is a partnership composed of two brothers, the other three are sole proprietorships. Each of these trenchers have a substantial investment in equipment and storage facilities. Although dues paying union members, these entrepreneurs prefer to work independently and by doing so have elected to forego union benefits. They have consistently refused to become employees of any contractor or to be put on any contractor's payroll as an employee. Nor can the Union force the trenchers to incorporate or become employees of other contractors.

BENAL is faced with a situation where the trenchers have chosen to act as independent contractors. As such, they have elected not to participate in union benefits. Faced with its inability to control its own members, the Union has turned to exerting secondary pressure on BENAL through the trusts.

The secondary pressure is brought to bear through the terms of the MLA. The MLA contains various clauses dealing with owner-operators and subcontractors which purport to make BENAL responsible for the actions of the

independent trenching contractors. These clauses themselves are a scheme by which the unions, through the trust funds, are attempting to circumvent the restrictions of federal labor law.

Proceedings Below

The Plaintiff trustees filed suit in the Central District of California on July 19, 1979, seeking unpaid fringe benefit contributions from *January 1, 1970* forward for hours worked or paid to BENAL's employees covered by the MLA.

The parties filed cross-motions for summary judgment based on a statement of stipulated facts. The stipulated facts contained all of the elements that led the District Court to conclude as a matter of law that the trenchers are independent contractors. The Court then granted summary judgment in favor of BENAL holding that the Labor-Management Relations Act ("LMRA") barred payment by BENAL on behalf of the trenchers.

On appeal, the Ninth Circuit affirmed the summary judgment below holding that no true employment relationship existed between BENAL and the independent trenchers despite the language of the MLA; and, that contributions on behalf of independent contractors who are not employees are barred by § 302 of the LMRA. The Ninth Circuit, in considering whether or not the subcontracting clause applied to the partnership/independent contractor, did not address that issue because it was not argued to the District Court.

———o———

SUMMARY OF ARGUMENT

The Ninth Circuit correctly ruled that contributions on behalf of independent contractors who choose not to become employees are barred by § 302(c) (5) of the Labor-Management Relations Act of 1947. Claims arising under the subcontracting clause of the Master Labor Agreement were not properly raised below. The claims should also not be reviewed by this Court because the subcontracting clause is inapplicable when an independent contractor's employees are Union members who choose to work outside the confines of the Master Labor Agreement.

———o———

REASONS WHY THE WRIT SHOULD BE DENIED

I.

Neither The Decision Below Nor The Record Raises Important Reasons For Review Or A Conflict With State Or Federal Cases Warranting Review By This Court

A writ of certiorari should be granted only when there are special and important reasons for granting the writ. None are present in this case.

The Ninth Circuit Court of Appeals properly ruled that a contractor cannot be required to make fringe benefit contributions on behalf of independent contractors in that they are not employees of the contractor. The Ninth Circuit's decision below is in harmony with well-established federal law that prohibits payments to trust funds

by an employer on behalf of persons who are not his employees. *Walsh v. Schlecht,* 429 U.S. 401, 97 S.Ct. 679 (1977); Labor-Management Relations Act of 1947 § 302(c) (5) [29 U.S.C. § 186(c) (5)].

In addition, there is no conflict between the decision below and that of the Tenth Circuit in *Trustees of Teamsters, Etc. v. Hawg-N-Action, Inc.,* 651 F.2d 1384 (10th Cir. 1981), *cert. denied,* 455 U.S. 941, 102 S.Ct. 1433-34 (1982), as claimed by petitioners. In *Hawg-N-Action,* there was no clause which required the contractor to put owner-operators on the contractor's payroll as employees. Here, that requirement was express in the MLA. In *Hawg-N-Action,* there was no question that the independent contractors and their employees would not benefit from the contributions. Here, the benefit to the employees from the contribution is express. The Court below was concerned with the requirement of treating an independent contractor as an employee. It decided one could not be both an employee and an independent contractor, an issue not raised in *Hawg-N-Action.*

Well established under federal law is the rule that § 302 prohibits payments to trust funds by an employer *on behalf of* persons who are not his employees. *Walsh v. Schlecht,* 429 U.S. at 408. Therefore, as the Ninth Circuit held, there must exist a true employer/employee relationship before payments to trust funds are permitted. If BENAL were to put the trenchers on its payroll, the trenchers would in fact and law remain independent contractors. As stated by the Ninth Circuit, contractual language alone is not sufficient to transform the relationship from that of independent contractor to that of em-

ployer/employee. Nothing in the stipulated facts suggests that if the formal requirements of the MLA were followed, the substantive nature of BENAL's relationship to the owner-operators would change. Given the stipulated facts in this case, an independent contractor, by any other name, remains an independent contractor and *not* an employee. It follows that § 302 prohibits payments by BENAL *on behalf of* the trenchers.

II.

The Trustee's Claims Under The Subcontracting Clause Should Not Be Reviewed By This Court

The Ninth Circuit correctly refused to review the trustee's claims under the subcontracting clause on the basis that the claims were not argued below. The issue is not raised in the pleadings, in the District Court's findings of fact and conclusions of law, nor in the Ninth Circuit opinion. See, *Trustees of Teamsters, Etc. v. Hawg-N-Action,* 651 F.2d at 1388. Assuming the claim has been preserved for appeal, it is not one which this Court should review. The law, as applied to the particular facts of this case, requires the same conclusion as that reached by the Ninth Circuit.

In *Moglia v. Geoghegan,* 403 F.2d 110 (2nd Cir. 1968), *cert. denied,* 394 U.S. 919, 89 S.Ct. 1193, the Court held that the only payments which may be legally made or accepted by the trusts are payments made by persons who are signatory to a written trust agreement. In this case, neither the trenchers nor their employees have executed an agreement with the trusts. Furthermore, BENAL cannot make contributions on their behalf because the trenchers and their employees are not employees of BENAL.

The subcontracting clause of the MLA is intended to penalize the use of subcontractors employing non-union employees. The cases permitting payment to the trusts under a subcontracting clause are based on the rationale that the contributions are merely "measured by" the hours worked by non-union employees. *Walsh v. Schlecht,* 429 U.S. 401, 97 S.Ct. 679 (1977). Here, each of the workers are union members. In their self-employment they have effectively chosen not to have payments made to the trusts. BENAL is powerless to affect those decisions. By requiring union members on the job site, despite their independence as a contractor, BENAL has met the intent of the subcontracting clause.

CONCLUSION

It is respectfully submitted that Petitioner has wholly failed to sustain its burden of establishing under Rule 17 that there are special and important reasons why the writ should be granted. The Ninth Circuit Court of Appeals correctly held that, given the stipulated facts, BENAL was entitled to prevail as a matter of law. Therefore, BENAL respectfully requests that the Petition for a Writ of Certiorari be denied.

DATED: January 26th, 1984.

Respectfully submitted,

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